

Trust Variations: Practice and Pitfalls



J Van der Velde
TEP FCPA CTA FTIA



Express Trusts

2

- Variation
 - General Law
 - Federal Tax
 - State Duties



VdV Legal

Variation

3

- Why vary
 - Over 800,000 trusts in Australia
 - Social changes
 - Small Business Structures
 - Business environment and technology change
 - Family Wealth Planning
 - Family relationship change



VdV Legal

Variation

4

Read the Deed

- Consider the whole of the deed
 - the natural and ordinary meaning of the words used;
 - the overall purpose of the document;
 - other provisions which relate to the one you are examining; and
 - common sense



VdV Legal

Variation

5

- No inherent General Law power to vary a trust
- No power to vary in the Trustee Act 1936 (SA)
- Options
 - Use power of variation or amendment in the deed
 - Apply to the Supreme Court under 59B or 59C



VdV Legal

Variation

6

- Power of variation or amendment
 - Can be exercised on its terms
- Form
 - Do you need a deed
- Consent
 - Whose consent is required
 - For whose benefit is the consent required



VdV Legal

Variation

7

Power of variation or amendment must be exercised for the purpose for which it was granted

"within the intention of the settlor as evidenced by the trust deed creating the power. If the trustee exercised the power contrary to this principle, equity holds the exercise of the power as a 'fraud on a power', that is the power has been exercised for a purpose or with an intention beyond the scope of, or not justified by, the trust deed"

Mercanti v Mercanti (2016) 340 ALR 290, 219 (Buss J)



VdV Legal

Variation

8

Mercanti v Mercanti

- Family business succession
 - Father started the business
 - Structure included two discretionary trusts
 - The first settled in 1979 and the second in 1996
- 2004 succession planning
 - Varied both trusts naming elder son appointor and guardian
 - Father consented to variations
 - Held majority of shares in trustees



VdV Legal

Variation

9

Mercanti v Mercanti

- Family business dispute
 - Father removed elder son as director of trustee
 - Elder son purported to change trustee and appoint company he controlled
- If original changes of appointor were valid in 2004 the new trustees were validly appointed
- Found:
 - one valid and one invalid



VdV Legal

Variation

10

Blenkinsop v Herbert

- Family dispute
 - Family unable to agree
 - Trust could not be administered
 - Supreme Court authority to change fiduciary roles
 - Guardian not a fiduciary
 - Intent that the individuals involved could protect their own interests under the deed



VdV Legal

Variation Clause

11

Wording of variation clause will determine what may be varied

- Trusts
- Duties of trustee
- Rights of trustee
- Powers of trustee
- Provisions or terms of the deed



VdV Legal

Variation Clause

12

"if an arrangement while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trust"

Re Balls Settlement Trusts

"there is an irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts."

Armitage v Nurse

Benefit of the beneficiaries as a whole

Keams v Hill (1990) 21 NSWLR 107



VdV Legal

Capital Gains Tax

13

- *Federal Commissioner of Taxation v. Commercial Nominees of Australia Ltd* [2001] HCA 33
- *Federal Commissioner of Taxation v. Clark and Anor* [2011] FCAFC 5
 - Special leave refused with costs



VdV Legal

Capital Gains Tax

14

- ~~Creation of a new trust – Statement of Principles August 2001~~
- TD 2012/21
 - a change causes the existing trust to terminate and a new trust to arise for trust law purposes, or
 - the effect of the change or court approved variation is such as to lead to a particular asset being subject to a separate charter of rights and obligations such as to give rise to the conclusion that that asset has been settled on terms of a different trust



VdV Legal

Capital Gains Tax

15

- TD 2012/21
 - Adding/ removing beneficiaries
 - Extending powers
 - Changing definitions
 - Extending vesting date
 - Restricting trustee rights



VdV Legal

Capital Gains Tax

16

Anti Avoidance Taskforce – Trusts

- “changes have been made to trust deeds or other constituent documents to achieve a tax planning benefit, with such changes not credibly explicable for other reasons”
- TR2017/D10 Income Tax: Trust Vesting – amending the vesting date and consequences of a trust vesting



VdV Legal

Capital Gains Tax

17

Trust Splitting

- appointment of new trustee over some but not all trust property
- variations apply to some but not all trust property
- PBR Authorisation Number: 1012921290075
 - “NOTICE: The ATO is currently considering the tax consequences of ‘trust splitting’ generally. For more information, please search for ‘Consultation’ on ato.gov.au.”
- Section 960-100
 - “entity consisting of the person who is the trustee [...] at any given time”
 - Note: the entity does not change “merely because of a change in the person who is the trustee”



VdV Legal

Stamp Duties

18

The terms of the Stamp Duties Act 1923

Section 4

Duties specified in Schedule 2 are charged on instruments specified in Schedule 2

- conveyance or transfer on sale of property
- conveyance operating as voluntary disposition inter vivos



VdV Legal

Stamp Duties

19

Section 71(3)(a) deems

- (i) a transfer of property to a person who takes as trustee; or
 - (ii) a declaration of trust; or
 - (iii) the creation of an interest in property subject to a trust; or
 - (iv) a transfer of an interest in property subject to a trust; or
 - (v) the surrender or renunciation of an interest in property subject to a trust; or
 - (vi) the redemption, cancellation or extinguishment of an interest in property subject to a trust,
- to be conveyances operating as voluntary dispositions *inter vivos*



VdV Legal

Stamp Duties

20

- Provision or extension of a power of the trustee
- Amendment to the administrative terms and conditions
- Terms such as the nomination of a trust officer
- Changes in interests or potential interests of the objects
 - Income
 - Capital



VdV Legal

Stamp Duties

21

Discretionary trusts

- Potential beneficial interest defined
 - 'the rights, expectancies or possibilities of an object of a discretionary trust in, or in relation to, property subject to the discretionary trust' s 2
- Transfer of a potential beneficial interest
 - [is] 'chargeable with duty as if it transferred the beneficial interest in the property that the transferee would have if the discretion under the discretionary trust were so exercised as to confer upon him the greatest benefit in relation to that property that can be conferred upon him under the discretionary trust.' s 71(8)



VdV Legal

Stamp Duties

22

More likely exemptions

- s71(5)(g)
- s71(5)(d)
- s71(5)(ai)
- s71CC



VdV Legal

Stamp Duties

23

Unit trust schemes

- Unit holder deemed to have a beneficial interest in the underlying property
- Market value net of liabilities
- Ad valorem duty



VdV Legal

Stamp Duties

24

Unit trust schemes

- From 1 July 2018
 - sub-sections; 71(4), (4a) and (4b) to be repealed
 - Landholder threshold also removed
 - No duty on qualifying land



VdV Legal

In Practice

25

Before undertaking a variation of trust

- do you or your client have the original deed of trust;
- what may be varied;
- who has the power to make the change;
- what procedures are needed;
- whose consent is required; and
- any specific restrictions on power of variation



VdV Legal

In Practice

26

Consent of the settlor

“The parties who executed an instrument are jointly and severally liable to pay the duty charged in respect of the instrument.”

s 4 Stamp Duties Act 1923



VdV Legal

Questions

27

Julie Van der Velde
VdV Legal
37 Angas Street
Adelaide SA 5000
Tel 7009 4855
Julie@vdrvlegal.com.au



VdV Legal